UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

MOTION FOR SUMMARY RELIEF DENIED: September 28, 2012

CBCA 2407

SHAW AREVA MOX SERVICES, LLC,

Appellant,

v.

DEPARTMENT OF ENERGY,

Respondent.

Mark J. Meagher and Joseph G. Martinez of McKenna Long & Aldridge, LLP, Denver, CO, counsel for Appellant.

Timothy P. Fischer, Savannah River Site Office, National Nuclear Security Administration, Department of Energy, Aiken, SC; and Keith R. Landolt, Office of the General Counsel, National Nuclear Security Administration, Department of Energy, Washington, DC, counsel for Respondent.

Before Board Judges **DANIELS** (Chairman), **POLLACK**, and **McCANN**.

DANIELS, Board Judge.

The Department of Energy (DOE), respondent, moves for summary relief in a case regarding the reasonableness of costs which Shaw AREVA MOX Services, LLC (MOX Services), appellant, incurred, and for which it was reimbursed by the agency, under a cost-type contract. We deny the motion, for it is premised on an incorrect legal standard and material facts are in dispute.

Background

The contract underlying this dispute is for the design, construction, and operation of the Mixed Oxide Fuel Fabrication Facility, a nuclear processing facility that will take plutonium which is surplus to the United States' national security needs and blend it with depleted uranium to make fuel to be irradiated in commercial power reactors. The facility is being built at DOE's Savannah River Site (SRS) near Aiken, South Carolina. The parties characterize this contract as a cost reimbursement or cost-plus-fixed-fee contract.

The contract was awarded to Duke, COGEMA, Stone & Webster, LLC in March 1999. After a series of mergers and acquisitions, MOX Services assumed the contract in mid-2006. MOX Services is owned by Shaw Environmental and Infrastructure, LLC and AREVA NC.

Between 1999 and 2006, much of the design work under the contract was performed at Charlotte, North Carolina, and other locations. Toward the end of 2006, as the project neared the start of construction, MOX Services began to relocate operations to Aiken. At this time, however, uncertainty existed as to when construction would actually begin. According to MOX Services, the company encountered a number of difficulties in recruiting and retaining qualified personnel[1] to work at the SRS. These difficulties included hesitancy by some personnel to permanently relocate to the Aiken area, a housing market in which prices were declining, increased competition for personnel in the nuclear power industry, uncertainty regarding funding for the contract, and the limited duration of performance by certain trades or individuals with certain professional expertise.

To address these concerns, MOX Services says that its senior management considered several alternatives, including increasing base compensation for personnel who would relocate to Aiken, tasking personnel from other sites to the SRS on business travel, and developing a policy to address the circumstances. The company ultimately determined that the last option was preferable. It established a Long Term Temporary Assignment (LTTA) policy in February 2007. Under this policy, personnel who maintained a permanent residence more than fifty miles from Aiken and were deemed by company management to fill a critical role would be reimbursed for a portion of the expenses they incurred for maintaining a second residence in the Aiken area. Individuals receiving LTTA payments would receive

[1] MOX Services says that it "is an unpopulated limited liability company" and that any references to "personnel" or "employees" are to "personnel employed by either of MOX Services' members and assigned to work on the Contract."

a monthly lump-sum payment equal to seventy percent of the per diem allowance established by the General Services Administration for government employees traveling to Aiken.

MOX Services kept the DOE contracting officer informed about its development of the LTTA program. The company and the contracting officer engaged in many discussions about the program and its application. The contracting officer expressed concerns that the information the company provided was not adequate to support the costs claimed. By letter dated March 7, 2008, the contracting officer proposed that $1,483,023.23 would be disallowed unless documentation was presented to support these costs.

In August 2008, the contracting officer approved MOX Services' fourth iteration of LTTA (now called Jobsite Living Allowance (JLE).) This iteration included at least two revisions which had been made at the contracting officer's request. The company capped reimbursements to an employee at the amount equal to the cost of relocating that employee to Aiken, but excluding the costs of later relocating him following completion of his work on the contract. The company also limited the duration of LTTA/JLE benefits to twenty-four months.

DOE continued to review LTTA/JLE costs. In October 2010, the contracting officer sent to the company a second notice of intent to disallow costs, identifying $2,172,670 as unallowable. After discussions with the company, the contracting officer reduced this amount to $2,097,993.15. The company continued to maintain that these costs are allowable. On February 1, 2011, the contracting officer sent to MOX Services a decision which held that the company must make payment to DOE in the amount of $2,097,993.15 "for the . . . personnel who received inappropriate monetary benefits which were previously invoiced and paid by the Government." MOX Services has appealed this decision.

The amount at issue involves payments to approximately half of the sixty-eight (according to the contracting officer) or sixty-nine (according to MOX Services) personnel who received LTTA/JLE benefits.

The contracting officer says that some of the employees had agreed to accept permanent positions in Aiken with lump-sum relocation benefits, and that the LTTA/JLE payments granted to those individuals were considerably more than the lump-sum benefits would have been. She also maintains that the company's documentation shows that some employees received LTTA/JLE benefits for periods of time which were not temporary – some lasting as long as five years – in violation of program requirements. She explained, "The jobs were not temporary in nature. MOX Services took no steps to find replacements for the individuals filling the positions temporarily, and many of the employees stated that they intended to stay on the project long term." Thus, the contracting officer concluded that

the costs at issue were not reasonable, as that term is understood in Federal Acquisition Regulation 31.201-3.

MOX Services, on the other hand, says that it "made a determination that payment of LTTA was appropriate to address: (1) individuals who intended to relocate to Aiken, South Carolina, but were unable to do so as anticipated because of the housing downturn in 2007 and 2008; and (2) individuals who were offered relocation, but nevertheless indicated they were not willing to relocate to Aiken." The company also states that it encouraged personnel to relocate permanently to Aiken and worked to recruit personnel who were willing to relocate permanently. MOX Services also notes that the contracting officer did not cite any justification other than lack of reasonableness for demanding repayment of the funds at issue.

Discussion

Resolving a dispute on a motion for summary relief is appropriate when the moving party is entitled to judgment as a matter of law, based on undisputed material facts. The moving party bears the burden of demonstrating the absence of genuine issues of material fact. All justifiable inferences must be drawn in favor of the nonmovant. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

The parties agree that whether the costs in question are reasonable is to be determined by application of Federal Acquisition Regulation 31.201-3, "Determining reasonableness." This provision states:

> (a) A cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred by a prudent person in the conduct of competitive business. Reasonableness of specific costs must be examined with particular care in connection with firms or their separate divisions that may not be subject to effective competitive restraints. No presumption of reasonableness shall be attached to the incurrence of costs by a contractor. If an initial review of the facts results in a challenge of a specific cost by the contracting officer or the contracting officer's representative, the burden of proof shall be upon the contractor to establish that such cost is reasonable.
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> (b) What is reasonable depends upon a variety of considerations and circumstances, including –
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> > (1) Whether it is the type of cost generally recognized as ordinary and necessary for the conduct of the contractor's business or the contract performance;

> (2) Generally accepted sound business practices, arm's length bargaining, and Federal and State laws and regulations;
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> (3) The contractor's responsibilities to the Government, other customers, the owners of the business, employees, and the public at large; and
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> (4) Any significant deviations from the contractor's established practices.

48 CFR 31.201-3 (2011).[2]

According to DOE, because the contracting officer made a thoughtful determination that the costs in question are not allowable, the Board must deny MOX Services' appeal of what the agency characterizes as a discretionary act. In support of this position, DOE cites the following paragraph from *Planning Research Corp. Systems Service Co.*, NASA BCA 680-11, 81-2 BCA ¶ 15,179, at 75,121-22:

> In the absence of an express contract provision or established practice between the parties controlling the allocability of the costs in question, this Board will not substitute its judgment for that of the Contracting Officer in the reasonable exercise of his discretionary authority. Appellant assumed the risk and responsibility of being wrong when it substituted its judgment for the Contracting Officer's.

As MOX Services points out, if this formulation of the law was ever correct, it has not been so since enactment of the Contract Disputes Act in 1978. This Act states that if a contracting officer makes specific findings in his decision, they "are not binding in any subsequent proceeding." 41 U.S.C. § 7103(e) (Supp. IV 2011) (restating language previously found at 41 U.S.C. § 605(a)). The Court of Appeals for the Federal Circuit has held, "[T]he Disputes Act itself suggests that, where an appeal is taken to a board [of contract appeals] or court, the contracting officer's award is not to be treated as if it were the unappealed determination of a lower tribunal which is owed special deference or acceptance on appeal." *Wilner v. United States*, 24 F.3d 1397, 1401 (Fed. Cir. 1994) (en banc) (quoting *Assurance Co. v. United States*, 813 F.2d 1202, 1206 (Fed. Cir. 1987)). Further, as explained by the Court, "[D]e novo review precludes reliance upon the presumed correctness of the decision.

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[2] This provision has been in effect since May 1987, and thus, throughout the life of the contract in question.

. . . [O]nce an action is brought following a contracting officer's decision, the parties start in court or before the board with a clean slate." *Id.* at 1401-02; *see also Bay Shipbuilding Co. v. Department of Homeland Security*, CBCA 54, et al., 07-2 BCA ¶ 33,678, at 166,743.

Thus, now that the contracting officer's decision has been appealed, it is the prerogative of the Board, writing on a clean slate, to determine whether the costs which DOE reimbursed and now believes were not allowable, are allowable or not. DOE acknowledges that "there could be differing opinions on the reasonableness of the disallowed costs." This concession, which we find corroborated by conflicting conclusions of the contracting officer's decision and a Shaw Environmental and Infrastructure vice president's affidavit, demonstrates that material facts are in dispute and therefore precludes summary relief. The appeal file submitted by DOE contains documentary evidence which may bear on this issue, as to each of the employees to whom payment of LTTA/JLE benefits is considered unreasonable by DOE and reasonable by MOX Services. We have scheduled a hearing at which we will receive testimony which may elucidate the documentary evidence and the justification for the conclusions reached by the parties. We will then decide, based on a preponderance of the evidence, how much of the costs, if any, were reasonably incurred by the company. *See Commercial Contractors, Inc. v. United States*, 154 F.3d 1357, 1362 (Fed. Cir. 1998); *Kelly Martinez*, IBCA 3140, et al., 97-2 BCA ¶ 29,243, at 145,458; *Conner Brothers Construction Co.*, VABCA 2519, et al., 95-1 BCA ¶ 27,409, at 136,643 (1994); *Griffin Services, Inc.*, GSBCA 11171, 92-1 BCA ¶ 24,556, at 122,534.

Decision

DOE's motion for summary relief is **DENIED**.

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STEPHEN M. DANIELS
Board Judge

We concur:

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HOWARD A. POLLACK
Board Judge

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R. ANTHONY McCANN
Board Judge